

**U.S. HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON ENERGY AND COMMERCE**

**Subcommittee on Commerce, Trade, and Consumer Protection**

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**“Fair Use: Its Effects on Consumers and Industry”**

**Statement of**

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On behalf of the Entertainment Software Association (ESA) and our member companies, I thank you, Mr. Chairman, for this opportunity to discuss the Fair use doctrine and how it impacts the video game industry and its consumers. It is the position of the Entertainment Software Association that current law properly balances consumers’ diverse interests in using copyrighted works with the protections content owners need to retain the incentive to continue creating and producing innovative entertainment products for consumers to enjoy.

The ESA is the trade association serving the public affairs needs of the world’s leading publishers of video and computer games, including games for video game consoles, personal computers, handheld devices, and the Internet. ESA members produced more than 90 percent of the \$7.3 billion in entertainment software sold in the U.S. in 2004. In addition, ESA’s member companies produce billions more in exports of American-made entertainment software, driving the \$28 billion global game video game market. Entertainment software is a vibrant and growing segment of the American economy, providing highly skilled jobs and ever-increasing exports.

Entertainment software companies invest significant amounts of capital in each of their games and the intellectual property that these represent. Developing and launching a top game often requires a team of more than 100 professionals working for more than three years, with development and marketing costs often running \$10 million or more and may foreseeably range as high as \$25- 40 million in coming years. As with any hit-based industry, not all of these titles actually achieve profitability. Nonetheless, the demands of the game-playing market compel ESA members to continue to work even harder to develop faster and more exciting software, requiring larger investments in the programming and technology that will produce the effects and challenges that consumers seek. The new generation of entertainment software consoles that will be launched over the next several months will require entertainment software publishers to make even

more significant levels of investment as the processing power of these new machines will permit more complex and realistic game design, further enhancing the game-playing experience for consumers.

## **I. What is the Fair Use Doctrine?**

“Fair Use” is a legal defense under copyright law that allows for limited uses of copyrighted materials in certain cases that would otherwise constitute infringement of copyright. The fair use defense, one of the few exceptions to rights holders’ exclusive rights, balances the public interest in scholarship, research, commentary and the like with the artist’s interest in having the exclusive right to reproduce and distribute his or her work. When the use of a copyrighted work for such a purpose has been judged a “fair use,” it is not an infringement of the copyright, even if the use was made without permission of the copyright owner. Originally created by the courts, the fair use doctrine was codified in the 1976 Copyright Act.

Fair use has always been determined on a case-by-case basis. There are no hard-and-fast rules that dictate that certain uses are always fair (or never fair). The statute lists four factors (although others can also be used) that must be considered in determining whether or not the use is fair:

- The purpose and character of the use. Title 17, Section 107 recites examples such as copying for purposes of criticism, news reporting, teaching, scholarship or research. But those purposes do not automatically make a particular use a “fair use” under the statute. Not every use by a library or educational institution is necessarily a fair use under the law;
- The nature of the copyrighted work in question;
- How much of the work is copied or otherwise used; and
- The effect of the use on the potential market for the work. This includes not only the impact on the current market, but also whether allowing the use (and others like it) could prevent a new commercial market from developing.

In examining particular circumstances of copying, courts consider the statutory defense using the four factors listed above. It was on this basis that the Supreme Court Betamax decision in 1984 ruled that private copying of over-the-air TV broadcasts for the purpose of time-shifting was fair use. However, even that case did not apply the same rule to private taping of cable television or pay-TV broadcasts, nor did it address the copyright status of “librarying” (the practice of making a permanent copy of a television program), and no later court has cited the Betamax case as a basis for permitting “private copying.” Aside from a specific statutory provision that Congress enacted in 1992 regarding non-commercial home recording of music on cassette decks and the like, any other instance of personal copying must be evaluated under the statute’s four factors, in light of the particular facts in the case at hand, to determine if it is entitled to the fair use defense.

The same is true of so-called “space shifting” or “platform shifting” – for instance, copying a video game so that it can be played on a different technological platform than originally intended by the copyright owner. Here too, the fair use defense applies only after consideration of all four statutory factors, in light of the particular facts of the case.

## **II. Fair Use is an Exception, Not a Right**

The fair use doctrine codifies nearly two hundred years of judicial experience in balancing the rights of copyright owners with social interests in research, scholarship and the like. The doctrine has worked well to accommodate these goals while retaining incentives for creators to create and for publishers to invest in bringing new copyrighted products to market. It was for this reason that Congress adopted the principles of the fair use analysis into the copyright statute.

In recent years, with the emergence of digital technologies and the rapid deployment of the Internet, consumers have seen their ability to access, use, copy and transmit digital material vastly expanded. Consumers’ use of these digital technologies has been a huge boon to the entertainment software industry, which benefited from consumers’ increasing comfort with using computers and the Internet. Unfortunately, it has also led many computer and Internet users to abuse digital materials protected by copyright.

In 1998, Congress enacted the “Digital Millennium Copyright Act” (DMCA). The DMCA was the foundation of an effort by Congress to implement United States treaty obligations and to move the nation’s copyright law into the digital age. The DMCA implements two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The foundation of this effort was to make digital networks safe places to disseminate copyrighted works for the benefit of consumers and copyright owners.

Specifically, the treaties require legal prohibitions against circumvention of technological measures employed by copyright owners to protect their works. Congress determined that current law did not adequately protect digital works and that to promote electronic commerce and the distribution of digital works, it was necessary to provide copyright owners with legal tools to prevent widespread piracy. As a result, the DMCA implements the treaty obligations by creating new prohibitions in title 17 on the circumvention of technological protection measures that protect access to a copyrighted work and the manufacture or sale of devices that permit such circumvention.

The most common critique of the DMCA has been that its enforcement constrains the exercise of fair use “rights.” However, no such rights are defined in the copyright statute, nor have any such rights been identified in U.S. case law. What U.S. law does provide for, through its codification of the fair use doctrine, is a certain degree of flexibility with respect to certain uses of copyrighted works that, although they may be

infringing, may qualify for an exemption for the people engaged in such uses. This is the balancing mechanism that Congress wisely adopted and has served the communities of copyright holders and consumers so well over many years.

Congress continued to retain the balancing of competing interests when legislating in the area of copyright protection. When Congress enacted the DMCA, it balanced the new provisions against circumvention of copyright protection measures by ensuring that consumers would continue to have the ability to make non-infringing uses of copyrighted works in the digital environment. Congress created a tri-annual rule-making process to be conducted by the Librarian of Congress in conjunction with the Copyright Office to determine whether non-infringing uses of copyrighted materials are being harmed or threatened as a result of the circumvention prohibitions in the DMCA and to formulate exemptions as necessary.

Since the DMCA was enacted, two rule-makings have been successfully conducted. In each rulemaking, the Copyright Office held numerous hearings around the country, reviewed evidence and testimony from hundreds of interested parties and considered numerous proposals for new exemptions. In both proceedings, it found evidence that certain users were not able to make certain non-infringing uses of certain classes of works that it deemed, on balance, likely to benefit certain consumers and unlikely to impact copyright holders. As a result, the Librarian issued exemptions for such uses of those classes of works from the prohibition against circumvention of technological protection measures. Specific to the entertainment software industry, exemptions were granted for 1) malfunctioning or old computer programs failing to permit access and 2) video games in obsolete formats to the extent libraries and archives wish to make preservation copies.

Unfortunately, because of the use of the term fair use “rights” in attacks on the DMCA, fair use and the DMCA are often contrasted as reflecting oppositional doctrines. Some point to recent cases, such as efforts to break the encryption of DVD movies and the well-publicized DMCA criminal case against a Russian programmer accused of circumventing the copy protection for Adobe System’s e-books, as reasons to re-examine fair use. However, neither case has anything to do with that doctrine. In both cases, the defendants were charged with trafficking in tools that strip off encryption and leave formerly protected material “in the clear” for any use, fair or piratical. In fact, both fair use and the DMCA reflect Congressional efforts to adopt a level of protection for copyright, balanced against certain uses by consumers that may qualify either as exempt under fair use or non-infringing under the DMCA.

### **III. What Effect Does Fair Use Have on the Video Game Industry and Its Consumers?**

In our view, any debate in Congress over these issues should be predicated on a complete understanding of the ways the entertainment software industry has sought and succeeded in meeting the legitimate needs of our consumers. The video game industry is

a leader in successfully meeting consumer expectations for access to, and use of, video game content.

Our industry has always been digital and did not need to convert from older formats to the digital environment. As a result, entertainment software companies have, for years, been leaders in developing creative business models that provide consumers a wide array of options to sample and play games. Without built-in marketing vehicles like radio, film trailers, and music television, the video game industry has had to develop innovative marketing strategies to generate excitement in new game products. As a result, the industry has used a variety of approaches to allow consumers to sample and play parts of games and, in some cases, entire games prior to purchasing:

- Rental: Under federal law, console video games are the only form of software that may be rented without the permission of the copyright holder, and over the years video game rentals have become a big business for retailers, allowing millions of people to play games without purchasing them and generating nearly \$ 7 million dollars at retail in 2004.
- Game Websites: Our companies routinely make “levels” of games available for free download on their own company sites, or through independent game websites. Through these sites, consumers can enjoy free access to games for a period of time to play and to sample prior to purchase.
- Demo Disks: Game companies provide several levels of games to publishers of gaming enthusiast magazines prior to or soon after release in the form of CD-ROMs that are inserted into the game magazines. From these demo disks, consumers can then sample literally dozens of new and popular games for free on their PCs.

The video game industry has developed additional means and technologies to deliver game product to consumers for use in a variety of formats to accommodate different consumer preferences:

- Massive Multiplayer Online Games: An entire gaming culture has been built around massive multiplayer games involving hundreds of thousands of individuals. Consumers pay a monthly subscription fee, usually between \$10 and \$15, to play with and against players from all over the world.
- Free Games: More than 30 million Americans now play board, card, trivia, and other casual games online at least once a month, typically for free.
- Pay to Play: Other games are available online to play for an hourly or daily fee.
- Episodic Games: Some games are delivered to consumers in episodes, with players paying a fee to receive each new level.

The entertainment software industry has a strong and proactive track record in voluntarily providing information about our products to customers. Consumers of video

games have known and accepted for years that video game hardware systems and computer and video game software are copy-protected in various ways. For example, there is no legitimate expectation on the part of consumers to copy a PlayStation game for use on a GameCube or an Xbox, or to copy a PC game for use on a dedicated game console. Our industry's consumers know that the games they purchase are embedded with certain technological restrictions. The use of technological protection measures has not interfered with the entertainment software industry's ability to meet consumer expectations with regard to access, play, portability, and ability to make full use of a game title.

A key factor to bear in mind is that game publishers are able to meet consumer demand for game products in these different forms and modes of access through the use of technologies that permit qualified or conditional access. Without such technologies, and most importantly, the ability to protect the integrity and use of such technologies, game publishers would be unable to respond to the increasing diverse consumer demand for game software on these many different platforms and modalities.

The protections afforded by the DMCA are essential to the vitality and continued growth of the entertainment software industry. It prohibits: 1) the circumvention, or "hacking," of technological measures that game publishers use to control access to and/or prevent piracy of their products, and 2) the development and distribution of tools to enable such hacking. Without this protection, the development and digital distribution of new game products would become an exceedingly daunting proposition because publishers would be placing at considerable risk the tens of millions of dollars spent in developing and marketing game products.

Because of the nature of the game software business, technological protection measures are a critical element of game publishers' ability to distribute and market their products. Unlike some of the other content industries, where products either pass through a sequence of media or enjoy prolonged life cycles, the active sales cycle of a new game release is often only a few months long. It is therefore critical that the game industry provide its products maximum protection from piracy during the short window in which they have to sell copies of their games after release and recoup the millions of dollars invested in the development and marketing of these game products.

This is the reason that our industry has invested heavily in technological protection measures, as these help to limit the damage that game publishers suffer from pirate versions of their games. For example, video game consoles have built-in access controls designed to prevent the playing of counterfeit versions of the games. These self-help protection methods act as "digital locks" that regulate unauthorized access to the game content. The DMCA's legal protections for these measures provide additional remedies for our industry to use against those who would undermine the use of these measures by promoting their circumvention.

Unfortunately, game publishers' technological protection measures are often circumvented and an unprotected version of a game may become available in the days

following its release. The resulting copy is a perfect copy that can be available for any purpose, not just non-infringing uses. In the digital world of today, the “single copy” will quickly become thousands (and ultimately, millions) of equally high-quality copies distributed instantly around the world. Billions of dollars worth of pirated entertainment software products are present in worldwide markets today and there are illegal devices such as “mod chips” and “game copiers” which circumvent access controls and allow for play of counterfeit games.

The entertainment software industry remains concerned about attempts to chip away at the protections afforded by the DMCA and other statutes in the name of fair use. As noted earlier, the DMCA provides those interested in seeking exemptions to the application of its circumvention provisions with a process for doing so. Many have taken advantage of the last two rulemaking processes to proffer suggestions for exempt uses and some have obtained the exemptions they were looking for. Indeed, a new DMCA rulemaking process has recently begun and new proposed exemptions will undoubtedly be considered. The process works; there is no need to undermine the DMCA or other applicable statutes at this time.

Those who seek to weaken the DMCA’s anti-circumvention provisions in order to promote so-called fair use “rights” may not be aware of the dangers that this poses to copyright holders, particularly the entertainment software industry. No technology exists to ensure that circumvention is done for only legitimate or non-infringing purposes. Any technology or device capable of “enabling significant non-infringing use” may also be capable of permitting rampant piracy. More to the point, should Congress enact proposals to allow circumvention for purposes of making fair use or the making and distributing of circumvention devices for purposes of making fair use, “mod chips” and “game copiers” will be legal and this would be devastating to the video game industry.

#### **IV. Conclusion**

The ESA and its members strongly endorse the Congressional judgment that led to the codification of the Fair Use doctrine in the U.S. copyright statutes and the enactment of the DMCA. Each reasonably accommodates the needs and interests of copyright holders and the consumers of their products. We believe that the marketplace is where legitimate industry and consumer expectations over product use or access should be resolved. The entertainment software industry is a strong example of this marketplace principle – an industry whose products include protection measures to prevent unauthorized copying and distribution and whose positive relationship with their consumers since the inception of the industry has made us the fastest growing segment of the entertainment industry.

As an industry that uses technology extensively to meet the challenge of ever-changing consumer demands, our industry would be unnecessarily and unfairly harmed by legislation aimed at altering the delicate balances embodied in Fair Use and the DMCA. Accordingly, we urge Congress to reject any efforts to erase the legal protections on which our members rely to bring innovative new entertainment software

and technologies to the marketplace in forms and modalities designed to produce the highest levels of consumer satisfaction.